the loan was agreed to, Rey had provided Conant with projections of audience, ratings, sales, income, expenses and cash flow-- the information Conant felt was germane to an intelligent investment decision. Finding 32.

6. Conant did not ask for financial statements from Rainbow's principals because he knew they did not personally have the money to finance the station. He wanted their personal guarantees to demonstrate their good faith and enforce their commitment by ensuring that whatever assets they had were at risk. Findings 33-34.

7. The Conant loan commitment to Rainbow fully met the Commission's reasonable assurance of financial qualification standard. *See*, ***Northampton Media Associates***, 4 F.C.C. Rcd. 5517, 5519 (1989), *affirmed*, 941 F.2d 1214 (D.C. Cir. 1991); ***Scioto Broadcasters***, 5 F.C.C. Rcd. 5158, 5160 (Rev. Bd. 1990). The terms and conditions of the loan were understood by the lender and the borrower. Rainbow had the requisite knowledge of Conant's ability to meet his commitment and Conant had sufficient personal and documentary information regarding Rainbow to make an intelligent investment decision. The parties knew each other well and had a history of business dealings.

8. Rainbow's application was filed at a time when the Commission did not require preparation of contempor-

aneous written documentation. Applicants had only to prepare documentation and make it available upon Commission request. ***Emision de Radio Balmaseda***, 8 F.C.C. Rcd. 4335 (1993); ***Northampton Media Associates***, *supra*, 4 F.C.C. Rcd. 5517, 5518-5519. Under the circumstances, Rainbow's reliance on the Conant commitment for financial qualification purposes was proper. *See* ***Scioto Broadcasters***, 5 F.C.C. Rcd. 5158, 5160 (Rev. Bd. 1990).

9. Howard Conant's loan commitment remained viable throughout litigation engendered when Press' existing station entered the market through a channel swap and Rainbow's tower company leased it space in 1990 within the antenna aperture on which Rainbow had maintained an exclusive lease since 1986. There is no question but that had Rainbow's preliminary injunction motion in that litigation been successful, Conant's funds would have been available to construct and operate the station. Findings 37-43.[5/]

5/ While the district court judge gearing the preliminary injunction motion was concerned about the Conant commitment, he was apparently looking for something more than the "reasonable assurance" required by the Commission and relied upon the fact that "a note for financing has not been completed" in finding that "the claim of irreparable harm appears speculative." *Rey v. Gannett Publishing Co.*, 766 F. Supp. 1142, 1148 (S.D. Fla. 1991). The judge manifestly considered that interposition of a federal court to enjoin challenged conduct in advance of litigating of the merits mandates the very documentation which ***Northampton Media***, *supra*, held unnec-

10. However, because of Joseph Rey's statement in conjunction with Rainbow's preliminary injunction motion that Conant "has told me that if Channel 18 gets on that tower, the likelihood is that he will not finance the station," the question arose whether there had been an unreported change in Rainbow's financing commitment. Even taken at face value, Rey's statement in no way compromised either Rainbow's financial qualification or Conant's commitment to provide its funds. The predictive and multiply hypothetical nature of the testimony reflected its context-- estimating in advance with sufficient precision to establish the irreparable injury justifying a stay what the effect of a challenged action not yet taken would be on a venture not yet started. Speaking in the context of market conditions in Orlando in January 1991, it was Rey's opinion that if he were to construct WRBW at that time, and if it were to be built then as the sixth rather than the fifth Orlando station, with Press' already established station as the fifth station, then it was likely that Conant would not finance Rainbow's station. Findings 44-47.

11. Accepting as fact the hypothetical that Rey would have chosen not to build or Conant not to finance

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essary to establish a broadcast applicant's financial qualification.

the station if it were to be built under those circumstances and at that time in no way diminishes either Rainbow's financial qualifications or Conant's commitment because neither choice was ever made. There was no change reported because there was no change in Rainbow's financial situation. Findings 48, 55.

12. And by the time the preliminary injunction was decided, the national economy, the broadcast market (with advertising up and the promise of a new national network), and the competitive situation in Orlando (where Nielsen planned to introduce meters, a boon to new independents), had all become sufficiently healthy that Rey's concern about Press' station had been reduced to recognition that it would cost a lot more and take a lot longer to make WRBW pay, but it could be done. Findings 49-55. There is absolutely no basis in the record to conclude that if matters had turned out as Rey believed they would in January 1991 and as a result Rainbow had lost its financing, it would not have promptly reported that fact to the Commission and promptly taken steps to procure alternate financing. But none of these things happened.

13. Nothing in the Commission's policies or precedents suggests that an applicant is required to report

unrealized changes to the Commission. The possibility that Rainbow might have changed its plans or financial arrangements, or even turned in its construction permit, if Judge Marcus had acted as he did in January rather than in June is of no moment to the Commission. Reality controls, and the reality is that when Judge Marcus issued his decision in June 1991, Rainbow immediately went forward with actual construction and stopped only when the transmitter building was completed in November 1991, notwithstanding the fact that its construction permit had expired in August 1991 and the sixth extension would not be granted until July 1993.

14. The uncontroverted record evidence establishes that Rainbow's submissions to the Commission regarding its financing were at all times accurate, complete and consistent with the applicable rules. Issue 2 must accordingly be resolved in Rainbow's favor.

Issue 3

15. The question presented by Issue 3 is whether Rainbow made misrepresentations of fact or lacked candor in its fifth and sixth applications for extension of time to construct regarding the effect of the Florida tower litigation.

16. In 1986, Rainbow entered into a lease with the Guy Gannett Publishing Company, owner of a tower at Bithlo, Florida. Rainbow believed that the tower contained two unique slots or apertures for mounting a television transmitting antenna, one at 1500 and one at 1400 feet. It was to secure the higher, 1500 foot slot, that Rainbow entered into the lease years before the licensing proceeding was completed. Findings 57-58. By 1991, Rainbow had expended over $300,000 in tower lease payments, and by July 1993 almost $500,000. Finding 47.

17. In August 1990, with the Supreme Court case winding down, Rainbow notified the tower owner that it was ready to proceed with construction. While the landlord had previously expressed an interest in constructing a three tenant transmitter building for Rainbow and a future FM and future television tenant, Rainbow's outstanding request for further information had gone unanswered. Consequently, Rainbow notified Gannett that it was planning to proceed with construction of its own transmitter building and, as required by its lease, identified the proposed architect and contractor and submitted the preliminary building plans. Findings 59-62.

18. In response, during August 1990, Rainbow and Gannett's representative, Rick Edwards, had discussions

about Gannett's proposed three tenant building and Rainbow was for the first time given copies of blueprints for the building dated June 12, 1990. Rainbow Exh. 7, page 8. Subsequently, Edwards told Joseph Rey that Gannett was planning on entering into a lease with Press Broadcasting to locate its Channel 18 antenna within the 1500 foot aperture of Rainbow's lease space. Finding 63.

19. Rainbow objected to the co-location of Press' antenna within its aperture. Finding 64. Negotiations between Rainbow and Gannett failed and on November 2, 1990, Rainbow filed suit in Florida state court against Gannett to vindicate its right to exclusive use of the 1500 foot antenna aperture on the Bithlo Tower. Findings 66-69. The case was removed by Gannett to Federal District Court in Miami. On November 30, 1990, Judge Stanley Marcus issued an order directing the defendants to "preserve said status quo and not to sign or consummate any agreement or lease with Press" until the preliminary injunction motion was decided. Press Exh. 14; Rainbow Exh. 5. Rainbow believed that Judge Marcus' order meant "that the status quo should be preserved, and according to the terms of the lease Rainbow cannot construct without the landlord." Findings 69-71.

20. The validity of Rainbow's understanding is borne out by the lease itself, which establishes that Rainbow could not, as a practical matter, proceed with construction without the active participation of Gannett. The lease, Rainbow Exh. 6, provides at Article III(b) and Article IV(c) that it is Gannett's responsibility to construct the transmitter building and bill the tenants and that it is the tenant's right to select the architect and contractor subject to the landlord's approval. Thus, with Gannett under court order to preserve the status quo, Rainbow was stymied and "could not go on the property and build on its own," Tr. 735. Findings 72-75.

21. Rainbow filed its fifth extension application on January 22, 1991. It was the first such request filed after completion of judicial review of the comparative proceeding. In Exhibit A to the extension application Rainbow recounted the lengthy history of the proceeding, including the then recently filed lawsuit against Gannett, and noted that "[u]pon denial of rehearing by the Supreme Court, Rainbow engaged engineering services to undertake construction of the station. Actual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Flor-

ida (Case No. 90-2554 CIV MARCUS)." Rainbow advised the Commission that a preliminary injunction motion had been filed and early action was anticipated. Finding 75.

22. Five months later, on June 6, 1991, Judge Marcus denied Rainbow's preliminary injunction motion and the status quo order was dissolved. Tr. 745-746? Rainbow immediately picked up where it had left off prior to the filing of the lawsuit and notwithstanding the fact that the underlying litigation continued, Rainbow went ahead with construction of the three tenant transmitter building. Finding 76.

23. On June 24, 1991, ten months after completion of judicial review of its initial grant, Rainbow filed its sixth request for extension of time to construct. In that request, Rainbow again recited the history of the proceeding to demonstrate that it had not yet been afforded the normal 24 months to construct and advised the Commission that its motion for preliminary injunction in the tower litigation had been denied. Rainbow reported that "[i]mmediately upon denial of the preliminary injunction request, Rainbow notified the tower owner of its intention to commence construction . . . and requested that the lease provisions regarding construction bids be effectuated." Findings 77-78.

24. Rainbow's sixth extension application was denied by Staff action two years later and granted on reconsideration on August 1, 1993. While Rainbow completed the transmitter building in November 1991 and so informed the Commission, no other physical construction was undertaken in the 1991-1993 period because Rainbow's construction permit had expired in July 1991. Finding 79.

25. Press' objections to Rainbow's extension requests, *inter alia*, asserted that Rainbow "falsely ascribe[d] its inability to complete construction to the tower dispute." *Memorandum Opinion and Order*, FCC 94-122, paragraph 43. In rejecting this assertion, the Commission disagreed with Press and held that "Rainbow did not . . . represent to the Commission that the tower suit precluded it from construction." The Commission viewed Rainbow's representations regarding the tower dispute in both the fifth and sixth extension applications as simply part of the recitation of the history of the proceeding. *Id.* The Court of Appeals, after considering Press' arguments, remanded the question to the Commission for further consideration. *Press Broadcasting Company v. F.C.C.*, 59 F.3d 1365, 1371 (D.C. Cir. 1985). It is that consideration to which Issue 3 is addressed.

26. "The sine qua non of a lack of candor is fraudulent intent." *Abacus Broadcasting Corp.*, 73 R.R.2d 1130, 1133 (Rev. Bd. 1993). "Misrepresentation . . . involves false statements of fact, while [lack of candor] involves concealment, evasion and other failures to be fully informative," *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129, 53 R.R.2d 44, 46 (1983). Both transgressions involve the element of deceit. *Id.* The Commission's concern with both stems from the fact that "effective regulation is premised upon the agency's ability to depend upon the representations made to it by its licensees." *Leflore Broadcasting Co., Inc. v. F.C.C.*, 636 F.2d 454, 461 (D.C. Cir. 1980). In this analytical framework, the first determination must be whether Rainbow's statement regarding the tower litigation was erroneous; if, and only if it was, then the second determination must be whether Rainbow had a fraudulent or deceitful intent.

27. Rainbow's statement that "[a]ctual construction has been delayed by a dispute with the tower owner which is the subject of legal action" was accurate. Rainbow's lease required the active participation of the landlord in the initial construction. The landlord was required either to construct the transmitter building or to ap-

prove the tenant's selection and plans. Here, Gannett would do neither because it was under court order to preserve the status quo until a ruling on the preliminary injunction motion issued. Rainbow accurately reported these facts to the Commission; it also promptly reported the June 6, 1991 denial of the injunction in its sixth extension application on June 24, 1991. Rainbow also clearly stated in both its fifth and sixth extension applications that the Florida proceeding would not prevent its timely construction of the station.

28. The fact that Rainbow's representation was accurate obviates consideration of fraudulent or deceitful intent. Nonetheless, Rainbow also notes that it had absolutely no reason to deceive the Commission. While the Court of Appeals appeared to believe that the Florida litigation was advanced as Rainbow's sole justification for requesting an extension, the applicant in fact offered **no** justification because it did not believe it had a duty to do so. Rainbow was simply filing periodic extension requests, in which it reported where matters were and why, because it had been instructed to do so.

29. Rainbow at all times believed, however, that it was entitled to and that the Commission intended to give it two years for construction after the conclusion of

judicial review during which it could construct as it saw fit and on whatever timetable within that time line it judged necessary or appropriate. At the time of the fifth extension, only five months had elapsed and when the sixth extension was filed Rainbow had held its unchallenged construction permit only 10 months. Accordingly, it understood the extension requests to be a purely formal administrative device, which were to be routinely filed and as routinely granted until it had received its full two year post-litigation initial construction period. Findings 87-89.

30. Given the accuracy of Rainbow's representations to the Commission, Issue 3 must be resolved in the applicant's favor.

Issue 4

31. Issue 4 presents the question whether Rainbow has demonstrated facts or circumstances either: 1) supporting waiver of the requirement of Rule 73.3598(a) that television stations be constructed within 24 months after "date of issuance of the original construction permit," 47 C.F.R. § 73.3598(a), or 2) supporting an extension of time to construct under Rule 73.3534(b), which makes extensions appropriate if a permittee can demonstrate that construction is complete and testing is underway,

that substantial progress has been made, or that no progress has been made for reasons clearly beyond the control of the permittee, who has taken all possible steps to expeditiously resolve the problem and proceed with construction, 47 C.F.R. 73.3584(b). Although the factual basis for action under either rule is the same, the legal analysis of the appropriateness of waiver of Section 73.3598 and of grant of extension under Section 73.3534 is different and the two matters will therefore be separately discussed.

32. Waiver of Rule 73.3598(a). It is settled law that waiver is appropriate in cases where literal application of a rule leads to inequitable or unreasonable results. While rules of general application establish the "public interest" in a broad range of situations, the Commission must nevertheless seek out the "'public interest' in particular, individualized cases." ***WAIT Radio v. F.C.C.***, 418 F.2d 1153, 1157 (D.C. Cir. 1969). "The agency's discretion to proceed . . . through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." ***Id***. As the *Designation Order* recognizes, an application for extension of time to construct partakes of the nature of a waiver request.

33. In designating this issue for hearing, the Commission pointed out that in ***Channel 16 of Rhode Island, Inc. v. F.C.C.***, 440 F.2d 266, 275-276 (D.C. Cir. 1971), the Court of Appeals held that a "permittee's uncertainty due to Commission inaction is sufficient basis to warrant grant of extension of time on equitable or waiver theory." *Designation Order*, paragraph 7. Presumably, the Court would have found equal warrant in "judicial inaction," which is in fact the only thing which put Rainbow in its present position.

34. Under the literal reading of Section 73.3598 mandated by the Court's remand decision, Rainbow is chargeable with 58 months of unused construction time while the licensing proceeding was on review. But for that time lapse, neither the fifth nor the sixth extension request need have been filed, since, as the Commission pointed out in granting the sixth request, only five months had passed since the end of appellate review when the fifth request was filed and ten when the sixth request was filed. Joint Exh. 10, page 8. Thus, if the time lost in litigation is not counted, by the time it filed its sixth request, Rainbow had used less than half the time to which it would otherwise have been entitled without any need even to file for extension.

35. In ***Channel 16 of Rhode Island***, *supra*, the "uncertainty" held to warrant grant of a further extension to the permittee did not concern its grant, which had long been final; rather the permittee had gone off the air and sought a series of extensions pending adoption of a cable policy the permittee deemed critical to its economic viability. It would appear to follow *a fortiori* from the Court's reasoning that uncertainty about the grant of the underlying authorization itself constitutes an equitable basis for grant of extension. Certainly the Commission's opinion granting the sixth extension made the requisite underlying judgment that "[i]t would have been unreasonable to have required or expected Rainbow to proceed with construction while faced with the uncertainties resulting from the appellate challenges to its construction permit." Joint Exh. 10, page 2.

36. While the Court rejected the Commission's resolution because it was at odds with the words of Rule 73.3598(a), which provides that permits are to be given "for a period of no more than 24 months from the date of issuance of the original construction permit," the basis for the Commission's ruling was undisturbed on review and serves equally as a basis for waiver.

37. The Commission's opinion granting the sixth extension did not, of course, address the issue of waiver, since it relied on what amounted to a substantial compliance analysis of the rule. While that result was held barred by the literal words of the rule, the Commission's underlying reasoning is equally applicable to the present issue and in fact offers an independent ground for waiver here: the fact that it is mandated by the intent of the rule. The Commission said that because Rainbow had "effectively" been given less than a year to construct, "we conclude that Rainbow should not have been required to make the showing specified under" Section 73.3534, "which was intended to apply to permittees who have already been afforded a full 24 month construction period. Rather, Rainbow was in the position of a permittee that had not had 24 months to construct." Joint Exh. 10, page 8.

38. While the Commission's reasoning is universally applicable to cases held up by review after issuance of construction permits, there is an additional reason why it is particularly compelling here. Rainbow formally resisted the requirement that it file extensions every six months during litigation because it believed it was entitled to two years after judicial review. While the

Commission Staff told it those filings were necessary, Rainbow was also advised that they were a formality and that it was indeed entitled to and would receive the normal two years after completion of review. Findings 87-89.

39. Such assurances are perhaps even more compelling than the situation in ***Channel 16 of Rhode Island***, *supra*, where the Commission was essentially found to have acquiesced in the permittee's choice to discontinue its initial operation and await the cable rules by granting a number of earlier extension requests without discussion. Moreover, while it is difficult now to see how Rainbow could have acted differently or faster had it known in April 1986 when it received its construction permit that its two year construction period was already running, the fact remains that how a permittee uses its time necessarily takes some account of how much time it has to use; Rainbow's planning might have been materially different had it not been given to understand that it had two years from completion of review.

40. There is also the fact that to refuse an extension because of time elapsed in judicial review would render retention of a validly granted construction permit dependent upon both the caprice of the agency staffer

issuing the actual permit and the malice of adversaries. While Rule 73.3598(a) provides that permits are to be given "for a period of no more than 24 months from the date of issuance of the original construction permit," 47 C.F.R. § 73.3598(a), it says nothing whatsoever about when the original construction permit is to be issued.

41. Had the relevant Bureau administrators chosen to issue Rainbow's construction permit after completion of judicial review, as they commonly do, then Rainbow's two years from issuance of the original construction permit would have run out in 1992 rather than 1988. To make the possible survival of a duly authorized permittee thus dependent on the timing of a ministerial act he can neither predict nor control would be facially irrational. Even more inappropriately, it would put an applicant at the mercy of anyone who chose to take all possible appeals, since they almost invariably occupy more than two years.

42. Finally, waiver in cases where the initial two year construction period is eaten up by judicial review is mandated by real world practicalities and basic common sense. Most permittees are neither foolhardy enough to construct a multimillion dollar facility to which they do not yet have "clear title" nor financially able to do so.

Certainly Rainbow could not have done so, because the construction financing from Howard Conant on which it relied when its original construction permit was issued in 1986 and when that permit expired in 1988 was specifically conditioned upon possession of a free and clear construction permit. Findings 43, 79.

43. Rainbow's situation presents a clear case for waiver of Rule 73.3598(a). To afford Rainbow 24 months from completion of judicial review is a simple matter of fairness and common sense which puts it in the same position as all other television permittees and creates no troublesome precedent. On this basis alone, Issue 4 should be resolved in Rainbow's favor.

44. Compliance with Rule 73.3534(b). Independent of the waiver question, Rainbow's sixth extension request was eligible for grant as a matter of hardship under the standard set forth in Section 73.3534(b). First, Rainbow had in fact made substantial progress during the fifth extension period, making it eligible for the sixth extension under § 73.3534(b)(2). Second, if Rainbow's progress during the fifth extension were for any reason to be deemed insufficient, it was for reasons beyond the applicant's control and the applicant took all possible

steps to resolve the problem and proceed with construction.

45. Under Commission precedent, the only time period relevant to consideration of an extension request under Rule 73.3534(b) is the last authorized period. ***Contemporary Communications***, 11 F.C.C. Rcd. 5230, 5231 n.6 (1996). Rainbow's progress during the fifth extension period (February 5, 1991 - August 5, 1991) was substantial notwithstanding the ongoing tower litigation and the Florida district court's status quo order which resulted in the tower owner's inability to move forward with the necessary initial construction during the majority of the permit period. Although Rainbow did not complete its transmitter building until shortly after expiration of the fifth extension, that construction was begun immediately after the status quo order was dissolved in June 1991 and continued throughout the period. In addition, during the fifth extension period, Rainbow continued to engage in construction related planning and to pay rent on its tower lease, on which alone it would pay a total of almost $500,000 by 1993. Finding 47.

46. While "substantial progress" must be evaluated on a case by case basis, ***New Orleans Channel 20, Inc. v. F.C.C.***, 830 F.2d 361 (D.C. Cir. 1987); ***Mansfield Chris-***

tian School, 10 F.C.C. Rcd. 12589 (1995), two factors which have been deemed important in establishing substantial progress in other cases, *see, e.g.*, ***Community Service Telecasters, Inc.***, 6 F.C.C. Rcd. 6026, 6030 (1991), are also present here: substantial funds had been placed "at risk" and actual construction had occurred prior to expiration of the fifth extension period.

47. Rainbow expended almost $1 million before expiration of the sixth extension period, a significant portion of which was spent during the fifth extension period.[6/] Joint Exh. 10, page 3; Rainbow Exh 8, page 5. In addition, notwithstanding the delay engendered by the tower litigation, Rainbow continued to maintain its site lease, undertook preconstruction planning and began actual construction of the transmitter building during the relevant period. These facts support a conclusion that Rainbow satisfied the "substantial progress" provision of § 73.3534(b)(2). Issue 4 should therefore be decided in Rainbow's favor.

6/ Pursuant to the terms of Rainbow's tower lease, its rent payments between 1986 and August 1991 totalled more than $300,000. Finding 47. These funds, plus the engineering and construction monies are "at risk" funds for purposes of evaluating "substantial progress." ***Community Service Telecasters, Inc.***, 6 F.C.C. Rcd. 6026, 6030 (1991).

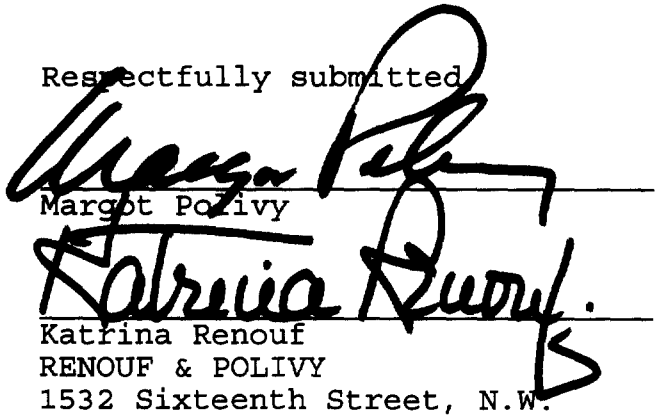
48. Rainbow's satisfaction of the third alternative prong of the Rule 73.3534(b) test constitutes an independent ground for favorable resolution of this issue, in that the delay during the February - August 1991 fifth extension period was beyond the applicant's control and Rainbow took all possible steps to proceed with construction. The tower litigation against Gannett was instituted almost three months before Rainbow filed the fifth extension application on January 25, 1991 and the Florida court had already ordered the defendant, Gannett, to maintain the status quo. Under the terms of its lease with Gannett, Rainbow could not commence actual construction without Gannett's participation and cooperation. Consequently, the lack of physical construction between February and June 1991 was attributable to the status quo order and beyond Rainbow's control.

49. Immediately upon dissolution of the status quo order and during the extension period, Rainbow took action to go forward with actual construction of the transmitter building. Rainbow's delay, if any, was neither of the applicant's making nor within its control. An extension of time to construct under § 73.3534(b)(3) is accordingly supported by the facts in this case and Issue 4 should be decided in Rainbow's favor.

CONCLUSION

For the reasons stated above and, as to Issue 1, in the Proposed Findings and Conclusions filed by Rainbow Broadcasting Company, Rainbow should be found qualified to be a Commission licensee and grant of the subject licenses should be found to serve the public interest, convenience and necessity.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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